3. The "Fee In Lieu Of" provision in Section 653 does not satisfy the requirement of just compensation.

As noted above, any federal statute that is construed to authorize a lawful taking must provide for just compensation in order to be valid.[93] But the FCC cannot avoid the takings objection to any mandated access to the local public rights-of-way its rules might allow by requiring the OVS provider benefitted thereby to make a nominal payment to the local government for access. In Loretto, the New York statute at issue provided for a one-dollar fee payable to the landlord for damage to the property. The Court concluded that the state legislature's assignment of damages equal to one dollar did not constitute the "just compensation" required by the Fifth Amendment. Thus, neither the Commission nor Congress can prescribe a nominal amount as compensation for right-of-way access. Rather, the affected local government would be constitutionally entitled to compensation measured by fair market value.[94]

---

[93] See United States v. 50 Acres of Land, 469 U.S. at 25; Western Union Tel. Co. v. Penn. R.R., 195 U.S. at 557 (no right-of-way can be appropriated without payment of just compensation); United States v. Acquisition, 753 F.Supp. 50 (D. Puerto Rico 1990) (power to extinguish easement rights is subject to compensation requirements); United States v. Carmack, 329 U.S. 230, 241-42, 67 S.Ct. 252, 257 (1946) (federal government can only take state land subject to limits of Fifth Amendment, including payment of just compensation).

[94] See United States v. Commodities Trading Corp., 339 U.S. 121, 126 (1950) (current market value); Bell Atlantic, 24 F.3d at 1445 n.3.

It is therefore no answer to the takings problem that the Act provides that any OVS operator "may" be required to pay a fee to the local government in lieu of the cable franchise fee.[95] To the extent that such a fee falls short of what the local government receives from cable operators, it does not represent the fair market value of the local government's property interests.

It is important to note in this regard that a cable franchise may — and typically does — include compensation to the local government above and beyond the cable franchise fee. Such compensation includes payments or in-kind contributions that fund public, educational, and governmental ("PEG") access facilities and (for franchise agreements entered into prior to the 1984 Cable Act) PEG operations.[96] Local governments' compensation from cable operators for use of local rights-of-way also often includes in-kind compensation in the form of dedicated PEG channels and facilities and institutional networks, which are explicitly authorized under 47 U.S.C. §§ 531 and 544.[97] Such facilities and local requirements contribute directly to the development of the nation's information infrastructure, filling

---

[95] 1996 Act, section 302(a) (adding new § 653(c)(2)(B)).

[96] See 47 U.S.C. § 542(g)(2)(B)-(C).

[97] The NPRM recognizes that cable operators provide PEG channel capacity, but fails to recognize the substantial cash and in-kind contributions cable operators have agreed to provide pursuant to franchise agreements to support PEG facilities. See NPRM at ¶ 19 n.33. And the NPRM completely overlooks institutional networks that many cable operators must provide under their franchises.

the gaps that would otherwise be left by commercial networks. For example, more schools have been wired pursuant to cable franchises than by telephone companies.[98] Similarly, institutional networks make feasible the dissemination of computerized information by local governments to citizens. Thus, the in-kind compensation agreed to in cable franchises helps serve the purposes of the Act.[99]

The total compensation cable operators pay for use of the local public rights-of-way, then, consists of both franchise fees and the additional types of compensation described above. Thus, cable franchise fee payments alone do not represent the full market value of the compensations for use of local rights-of-way that a cable operator pays to a local government. Thus, a "fee in lieu of" of a franchise fee that equals the cable franchise fee alone (much less "a fee in lieu of" that is less than a cable franchise fee), would fall short of the fair market value of the local public rights-of-way in any particular jurisdiction.

Unless the Commission interprets the "fees in lieu of" provision to include compensation over and above cable franchise fees, that provision in the Act fails to provide full compensation to a local government for an OVS operator's use of local rights-of-way. It is therefore insufficient to validate

---

[98] See Appendix A at p. 31 & n.38.

[99] See, e.g., 1996 Act, sections 706-708 (incentives to promote advanced telecommunications services to schools in particular).

any taking of the local government's property rights by OVS operators under color of Commission rules.

C. LECs' Existing Authorizations to Use Local Rights-of-Way to Provide Local Telephone Service do not Extend to OVS.

LECs will no doubt argue, as they did in the video dialtone proceedings, that even though a LEC needs local permission to use the local public rights-of-way, a LEC that is currently using those rights-of-way to provide telephone service needs no additional permission to build an OVS system and provide OVS service. This is incorrect. OVS falls far outside the scope of any pre-existing authority granted to LECs.

Grants made to LECs in the past gave them only the authority to use the rights-of-way to build and operate a local telephone network to provide telephone service subject to state law definitions of telephone service and subject to Title II of the Communications Act. But the 1996 Act specifies that an OVS is not a telephone network subject to Title II.[100] And the new creature called OVS certainly does not fall within the scope of the "telephone service" for which LECs were granted authority to use local rights-of-way by local governments or states decades ago. Thus, no past grant of authority to a LEC could be construed to include a right to use the rights-of-way for OVS, which is not telephone service and which did not exist at the time of such grants.

---

[100] See 1996 Act, section 302(a) (adding new §§ 651(b), 653(c)(3)).

Because an OVS is not subject to Title II, it cannot be considered part of the original regulatory arrangement — an implicit or explicit contract with the public — that a LEC made with state and local governments and that was subject to corresponding state regulation. Any prior grants to LECs were made to public utilities subject to comprehensive state and local price and service quality regulation, which required universal service under established regulatory structures. It appears, however, that an OVS will use the public rights-of-way on a non-utility basis, free from the comprehensive state and local price and service quality regulation and universal service requirements that were part of the LEC's original compact to use local rights-of-way. Thus, any ancient telephone right-of-way grant will not apply to OVS usage.

There are additional policy reasons not to construe any pre-existing LEC right-of-way grant to include authority to provide OVS. Unlike the case with traditional telephone service, the consumers of OVS services will not be synonymous with the taxpayer public in general, because some taxpayers will subscribe to OVS while others will not. Thus, taxpayers as a whole should not be required to subsidize OVS, though the grant of below-market access to taxpayer-funded local rights-of-way. An OVS operator should therefore have to make new arrangements with the local government to provide fair compensation for the crucial resource — the local rights of way — that the community is contributing to the OVS operator's new business. This

compensation represents a user fee charged directly against the entities that make a profit from using the rights-of-way, rather than the taxpayer subsidy that would result if an OVS operator did not pay just compensation.[101]

D. An OVS certification must demonstrate that the operator has obtained local authority to use the public rights-of-way.

To avoid a takings problem, a prospective OVS operator must be required to demonstrate that it has obtained the authorizations necessary under state and local law to use local public rights-of-way for OVS. The conditions laid down by the Act, however, require that this be done in the LEC's initial certification filed with the Commission. This is because the statutory ten-day certification requirement precludes any more than a facial review by the Commission. Moreover, although the statute does require public notice when the Commission receives a certification, the ten-day time period effectively precludes any meaningful opportunity for interested parties to comment on or oppose the certification filing — for example, by informing the Commission that the OVS applicant has not obtained the necessary local right-of-way authorizations.

Consequently, the Commission cannot assume that affected parties will bring any problems to the Commission's attention: they will not have time. Indeed, unless the Commission's rules

---

[101] The commenters endorse the comments of the City of Dallas, Texas, et al., on this issue.

provide clear and immediate notice to all affected parties, they may not even know that such a filing has been made.

For this reason, FCC rules must require the OVS operator's application to prove that it has done all of its homework beforehand. Since, as noted above, the Act does not give the FCC authority to infringe on local government control over local rights-of-way, the Act must be construed to require an OVS operator to obtain authority from the local right-of-way owner as a pre-condition to certification (or at least as a pre-condition to constructing and operating an OVS).

The Commission's requirements for the OVS certification must therefore ensure that OVS operator clearly and unmistakably demonstrates, on the face of its filing, that it has obtained all the necessary approvals and authority to use local rights-of-way. The certification must include incontestable evidence of specific authorization from each affected local government to use its public rights-of-way for OVS purposes — either in the form of attached licenses or franchises from each local community, or through written certifications by each affected community that such authority has been granted.[102]

If a prospective OVS operator were to obtain Commission approval without obtaining the necessary local authorizations, and the operator were to proceed to invade the public rights-of-way under color of a claim to Commission authorization, then the Commission and the federal government would be subject to an

---

[102] NPRM ¶ 69.

immediate takings claim.[103] To avoid subjecting the federal government to such major fiscal liabilities, not to mention extensive litigation, the Commission's OVS rules should not allow OVS operators to certify without clear local authorization.

Any other approach would not only impose unnecessary costs on federal and local taxpayers and the Commission, but would also unduly delay the entire OVS experiment. For this reason, the NPRM's proposal (at ¶ 68) for facial approval subject to later review is unacceptable. Such a rule would encourage LECs to file OVS certifications and then, on the strength of an incompletely informed Commission approval, seek to circumvent local authorities altogether: either by beginning to build OVS systems without authorization, forcing local governments to sue the LECs (and the Commission) to preserve their rights, or by claiming that local governments cannot reject the OVS operator's intrusion where the Commission has given its blessing. The only way to avoid such a labyrinth of litigation is to require that the OVS applicant have its ducks in a row before filing for certification — that is, by requiring unmistakable evidence of local consent to accompany the certification itself.

As noted in Section III.C above, the OVS operator also should be required to show in its certification application that it has met PEG and other local requirements. The local authorization attached to the operator's certification can thus do double duty by satisfying the PEG criterion as well. The

---

[103] See section V.A.3.a supra.

operator should be able to show that it will meet each applicable PEG requirement through a similar showing of local approval, since the affected local governments are the only ones who will be in a position to verify that the OVS operator will match the PEG obligations of the incumbent local cable operator.

Requiring OVS applicants to make the necessary arrangements prior to filing for certification should not cause undue delay. Local governments are not only willing, but eager to invite competition to the incumbent cable operator. Thus, LECs should not have difficulty in securing the necessary permissions, as long as they are willing to negotiate fairly and in good faith.[104]

By the same token, any FCC approval of an OVS certification should be made expressly subject to the applicant's obtaining and maintaining all necessary local approvals. Such a condition is directly analogous to the approach the Commission has taken by imposing conditions on its consent to CARS license transfers by cable operators.[105]

---

[104] It may be noted in this regard that Ameritech has already obtained twelve local cable franchises. Communications Daily, March 27, 1996, at 6.

[105] See, e.g., Letter to Jill Abeshouse Stern, 4 F.C.C. Rcd 5061 (1989).

E. The Commission's rules should recognize that disputes regarding an OVS's right to be in the local public rights-of-way cannot be resolved by the Commission, but only by the courts.

New section 653(a)(2) gives the Commission authority to resolve disputes "under this section." A dispute over an OVS operator's local right-of-way authority, however, would not arise under § 653. Rather, such a dispute would be arise from more fundamental constitutional issues regarding local communities' property interests. Thus, the Act gives the FCC no jurisdiction to resolve such disputes.

Moreover, the FCC has no expertise — or fact-finding capacity — to resolve disputes concerning the conditions under which an OVS operator should be permitted to use the local rights-of-way, which will vary depending on local circumstances and local law. It will simplify matters if any such claims are excluded from Commission responsibility at the outset. Thus, in bringing any OVS dispute to the Commission, the petitioner should be required to certify that the dispute does not involve a local right-of-way controversy.[106] Parties may pursue right-of-way issues simultaneously, if necessary, in court.

VI. CONCLUSION

OVS is intended to be distinctively different from cable. It is not intended to allow an OVS operator to be a cable operator in disguise, subject to different regulatory

---

[106] See NPRM, ¶ 72 (seeking ways to simplify dispute resolution).

requirements than its cable operator competitor. The market will determine whether the OVS or the cable operator model is more feasible. If the Commission were to give OVS special regulatory advantages over cable, this would substitute federal planning for the free market. Accordingly, the flexibility of an OVS operator must be bounded by the requirements of the statute and the policy objectives of the OVS provision.

Based on the foregoing, the attachments that should be required for every OVS certification filing must, at a minimum, include the following.

- Authorization from all affected state or local authorities to use the public rights-of-way in each affected area.
- Certification from all affected local governments that the proposed OVS will fulfill PEG obligations no less than those of any incumbent cable operator in each jurisdiction, either through directly matching such obligations or through a negotiated agreement with each affected local government.
- All necessary amendments to the LEC's Cost Allocation Manual and the date such amendments were filed with the Commission.[107]

If the Commission cannot clearly determine on the face of each certification that it is accompanied by all the necessary attachments, the certification must be rejected. Only such a clear "checklist" approach will permit the Commission to verify

---

[107] See NPRM ¶ 70.

that the certification meets minimal statutory requirements within the required ten-day period.

Respectfully submitted,

THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; MONTGOMERY COUNTY, MARYLAND; THE CITY OF LOS ANGELES, CALIFORNIA; THE CITY OF CHILLICOTHE, OHIO; THE CITY OF DEARBORN, MICHIGAN; THE CITY OF DUBUQUE, IOWA; THE CITY OF ST. LOUIS, MISSOURI; THE CITY OF SANTA CLARA, CALIFORNIA; AND THE CITY OF TALLAHASSEE, FLORIDA

By

Nicholas P. Miller
Tillman L. Lay
Frederick E. Ellrod III
Miller, Canfield, Paddock and Stone, P.L.C
1225 19th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 785-0600

Their Attorneys

April 1, 1996

WAFS1\44189.5\104257-00010

APPENDIX

A. In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Comments of the United States Conference of Mayors; the National Association of Counties; the City of Alexandria, Virginia; the Alliance for Communications Democracy; Anne Arundel County, Maryland; the City of Baltimore, Maryland; Baltimore County, Maryland; the City of Dallas, Texas; Howard County, Maryland; the City of Indianapolis, Indiana; the City of Los Angeles, California; Manatee County, Florida; Montgomery County, Maryland; Prince George's County, Maryland; and the City of Santa Clara, California, on the Fourth Further Notice of Proposed Rulemaking (March 21, 1995)

B. In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Reply Comments of the United States Conference of Mayors; the National Association of Counties; the City of Alexandria, Virginia; the Alliance for Communications Democracy; Anne Arundel County, Maryland; the City of Baltimore, Maryland; Baltimore County, Maryland; the City of Dallas, Texas; Howard County, Maryland; the City of Indianapolis, Indiana; the City of Los Angeles, California; Manatee County, Florida; Montgomery County, Maryland; Prince George's County, Maryland; and the City of Santa Clara, California, on the Fourth Further Notice of Proposed Rulemaking (April 11, 1995)

WAFS1\44189.5\104257-00010